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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 1122

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1377, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, the International Brotherhood of Electrical Workers, Local Union 1377, AFL-CIO, prays that a Writ of Certiorari issue to review the Decree of the United States Court of Appeals for the Sixth Circuit entered on April 9, 1964, upholding the order of the National Labor Relations Board of December 11, 1962.

I. OPINIONS BELOW

The opinion of the Court below is appended hereto at p. 70. The decision and order of the National Labor Relations Board appears at R. 3 and is reported at 140 N.L.R.B. 56. The Trial Examiner's Intermediate Report which recommended that the complaint of the General Counsel be dismissed in its entirety is at R. 27.

II. JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 USCA Section 1254) and Section 262 of the Judicial Code (28 USCA Section 1651) and under Section 10(e) of the National Labor Relations Act as amended, 29 U.S.C.A. Sec. 151 and under the Administrative Procedure Act, 5 U.S.C.A. Section 1009(e).

III. QUESTIONS PRESENTED

A. Whether the basic and vital finding of the Board was justified by a fair estimate of the worth of the testimony of witnesses, when this finding was that dues delinquencies were used as pretexts for discharge because "out of some 20 or more delinquen members [the Union] singled out for discharge only members of the dissident group" when this finding was not only based on no evidence at all but it ignored the uncontradicted testimony of this petitioner's Business Manager, whom the Trial Examiner found to be a credible witness, and who testified that all of the some 20 dissidents were delinquent and these dissidents were the *only* delinquents in the plant employing some 700 union members and who further testified without contradiction that the petitioner first had discharged the 2 most delinquent dissidents as a pilot step and then waited two weeks for the rest of the delinquents to pay their dues and when they did not do so he requested the discharge of the 7 dischargees herein, who were the next most delinquent, which did effect his declared purpose of causing all the remaining delinquents to pay their back dues.

B. Whether the Court below and the Board misinterpreted the National Labor Relations Act as amended, and their powers thereunder in holding that a dollar give-away

for attendance at meetings was a penalty instead of a reward and therefore that discharges for dues delinquency were unlawful, even though the discharged employees had for several months, as policy of harassment, refused to pay the $4 a month dues but sent in $3 only claiming they wanted to collect the $1 giveaway this way without having to go to the meetings to collect it; the dues were returned by the union for being in the wrong amount and the employees never sent back the dues to the union in the amount of $4 and finally 2 years later when they were running 4 and 5 months delinquent they were discharged for dues delinquency under a union-security clause.

C. Whether the Court below and the Board misinpreted the Act and their powers thereunder in holding the union grace period for payment of dues to be "at least 3 months" when there was no evidence to that effect and on the contrary the union's constitution provided that it was 21 days.

D. Whether the Court below and the Board misinterpreted the said Act and their powers thereunder in finding that where a dissident group by withholding their proper dues, co-mingling their dues payments and remaining several months delinquent for a period of two years in an attempt to harass, irritate and embarrass the union and who were aware of the union's security clause and received repeated notices of their dues delinquencies, but made no attempt to come into good standing, may escape enforcement of the union-security clause because the union was lenient for two years in not enforcing the clause against them.

E. Whether the Court below and the Board misinterpreted the Act in finding that conduct which occurred within the six-month limitation was an unfair labor prac-

tice solely through reliance on an earlier unfair labor practice which is barred by time from being asserted as a basis for the complaint.

F. Whether the Court and the Board below misinterpreted the Act by inferring illegal intentions to the Union's requests to the Company to rehire the dischargees and therefore failed to find that said requests tolled the payment of back pay against it.

IV. STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, 49 Stat. 449, 29 USCA 151 et seq., as amended by the Labor Management Relations Act, 1947 (29 USCA Sect. 151 et seq.), and by the Labor Management Reporting and Disclosure Act of 1959 (29 USCA Sect. 151 et seq.) and of the Administrative Procedure Act (60 Stat. 237, 5 USCA Supp. Sect. 1001 et seq.), are set forth in the Appendices A, B and C, *infra*, pp. 63 to 66.

V. STATEMENT OF THE CASE

A. History

Complaint was issued against the Petitioner and against the Leece-Neville Company on November 24, 1964, which complaint was amended five times by the General Counsel during the three day hearing.[1] By the last amendment the union was charged with causing the discharge of seven employees because (1) its insistence the said employees pay a fine assessed against them and (2) it accorded said employees a grace period of only 21 days for payment of dues rather than a grace period of 3 or 6 months it made generally applicable to its members in violation of Section 8(b)(1)(A). (See p. 58 this Brief where entire paragraph 13 of complaint is set forth.)

[1] The complaint and amendments are in the record at 236, 249, 255, 256.

The company was charged with violating Section 8(a)-(1)(3) (Appendix B herein). On March 12, 1962, the Trial Examiner rendered an intermediate report passing on all questions then in the case and making credibility findings and findings of fact on every issue then in the case and recommended the dismissal of the complaint in its entirety against both respondents.

Exceptions were filed by the General Counsel, and the Board on December 11, 1962, issued a split decision with Board Members Fanning and Brown dissenting, in effect overruling the Trial Examiner on every issue and finding that the respondent union, petitioner herein, discriminated in regard to the hire and tenure of employment of seven employees of the Leece-Neville Company in violation of Sections 8(a)(1)(A) and 8(b)(1)(A) by causing the then respondent company to discriminate against the above named employees, and that the company had engaged in unfair labor practices in violation of Section 8(a)(3) by discriminating in regard to the hire and tenure of the same employees. The Board ordered full back pay to be paid by the Company and the union and the company was ordered to reinstate the employees. April 8, 1963, the Board petitioned the Court below for enforcement of its order. This petitioner and the respondent company contended the Board's findings were not based upon substantial evidence. This petitioner further contended that the Board could not ignore the six month limitation in making a finding of an unfair labor practice solely through reliance on an earlier unfair labor practice which is barred by that limitation and the company further contended that the Board was wrong in finding that the company had reasonable grounds for believing that the employees' union membership was suspended for reasons other than failure to tender the required dues. On April

9, 1964, the Court below ordered that a Decree of Enforcement of the order of the Board of December 12, 1962, be issued (Appendix F herein) except that as to the company the Court found that there was not substantial evidence to support the Board's findings that the company had reasonable grounds for believing that the employees membership in the Union had been suspended for reasons other than failure to tender the required dues and it denied the enforcement of the order against the company.

For reasons stated below Petitioners assign the holding of the Court of Appeals in relation to this petitioner as error.

B. Statement of Facts

The sequence of events leading up to the discharge of the seven complainants had its beginnings in 1957, when a dissident group of members of the petitioner formed a rival organization called the Electrical Workers Alliance, Inc., to supplant the petitioner in the Leece-Neville plant. (R. 74.) Under specific orders of their counsel to harass the petitioner in payment of dues (R. 80), several hundred of this group withdrew their check-off authorization (R. 73) and thereafter the seven discharged employees and many others began paying their dues to the petitioner through a collector named Josephine Sturtz. Upon the transfer of Sturtz to another department in the early summer of 1958, Rose Brodnik, another leader of the rival labor organization, took over her role as dues collector for this group. (R. 104.)

The collective bargaining agreement between petitioner and Leece-Neville (G. C. 3) contained the usual union security clause. The amount of the monthly dues uniformly required by petitioner of its members was $4.00. Such amount was established by the petitioner's by-laws (G. C. 2; R. 257) which provide:

"Section 3. The monthly dues shall be $4.00.

"Section 4. $1.00 refund of dues collected for attendance of monthly meetings.

"Section 5. Dues are payable monthly in advance."

In accordance with this, $4.00 was collected monthly from the union members and $1.00 in cash, from the treasury of the Union, was given at the door (R. 70, 71) to each member who attended the monthly union meeting until November 30, 1959, when Section 3 of the By-Laws was amended so as to eliminate the $1.00 refund for attendance at Union meetings. (R. 200.)

In May, 1958, union membership was reminded of the amount of dues by petitioner's Business Manager Peter J. Zicarelli, who caused to be placed on the bulletin board the notice, "The dues are uniformly established at four dollars (4.00) per month." (G. C. Exh. 13; R. 280.)

In May, 1958, Betty Sipos and Mary Jaksic gave to Sturtz $3.00 each which was commingled by Sturtz in a check in the amount of $50.60 with the dues of 12 other employees and submitted by her in a letter of May 15, 1958. (G. C. Exh. 7; R. 262.) This check included payment of $4.00 dues for seven employees and $3.00 dues for the other seven. (R. 64.) Union Steward Harry Hines returned the check to Sturtz because it was not itemized (R. 64) so Sturtz then remitted the dues for the same 14 people by individual money orders, seven in the amount of $4.00 each and seven in the amount of $3.00 each. This time the union accepted the individual checks of $4.00 but refused the individual checks of $3.00 and returned them to Sturtz (R. 67) with the explanation that union dues were $4.00. (R. 70.)

As a result neither Mary Jaksic nor Betty Sipos was credited by the petitioner with having paid their May,

1958, dues. Sturtz did not return these money orders to either Jaksic or Sipos but turned them over to the legal counsel for the dissident group (R. 70).

The complainants Clark, Tomko and Yomnick submitted their dues to the union through Rose Brodnik. Sometime during the summer of 1958, Rose Brodnik sent to the Union $4.00 for each of these three employees, commingled in a bank money order in the amount of $70.00, with the dues of other employees. (G. C. Exhibit 9(b); R. 272.) The Union by letter of July 30, 1958 [G. C. 9(a)], returned the bank money order of $70.00 [R. U. 5(b)] for the stated reason, "* * * because monthly dues is $4.00 and two names appear on the enclosed list for only $3.00." No further tender was made of the dues of any of these employees. The $70 check went to Mr. Romisch, counsel for the dissidents, although some of the dissidents asked Miss Brodnik for their money back. She would not do so (R. 107).

General Counsel's Exhibit 10(d), (e) and (f) which were 3 pieces of paper stapled together indicate that Brodnik further submitted dues in August, 1958, on behalf of Clark, Tomko and Yomnick in the amount of $4.00 each, commingled with dues submissions on behalf of other union members including some in the amount of $3.00. The petitioner, on August 25, 1958, by letter, rejected the submission of these dues because of the commingling of $4.00 dues with $3.00 dues. Consequently the union's records now showed Clark, Tomko and Yomnick, as well as Sipos, to be in arrears for two months. Mary Jaksic (G. C. 10(c)) fell two months in arrears in July, 1958, when $4.00 dues sent by Brodnik was refused because of being commingled with the dues of others, one in the amount of $3.00.

Complainant Dragonic's dues, presumably for July, were submitted by Brodnik and rejected with the others by the above mentioned union letter of July 30, 1958. (G. C. 9(a).) Dragonic's name also appears on General Counsel's Exhibit 10(b) as having had $4.00 dues submitted by Brodnik for July, 1958. Brodnik submitted a lump sum money order of $23.00 for the dues of each person whose name appears on this exhibit which was rejected in the aforementioned August 25, 1958, letter from Business Manager Zicarelli. This left Dragonic owing union dues for the months of July and August.

The name of the remaining complainant, Joseph Dudash also appears on General Counsel's Exhibit 9(b) and General Counsel's Exhibit 10(e) (R. 272, 275); Dudash's submission of dues by Rose Brodnik through these documents was treated similarly to the others being rejected because it was commingled with erroneous $3.00 payments. As a result the union records now reflect that Joseph Dudash was behind in his dues for the two months of August, 1958, and an unknown month, probably that of July. (G. C. 9(b)). This left all seven complainants as of then, August, 1958, at least two months behind in the payment of their dues to the petitioner.[2]

Although on September 10, 1958, the Union, by letter (G. C. Exh. 12; R. 279) apprised each complainant that he was then 3 months behind in his dues, the sums that were returned to Sturtz and Brodnik, were not resubmitted to the union in separate amounts or in a manner in which they could be accurately computed. Instead, Brodnik gave all the returned checks and the list of people for whom she had submitted such dues to the group's attorney (R. 105, 106). From September, 1958 instead of sending the dues in correctly the delinquencies continued and became

[2] See R. U. Exh. 9 A through C for an analysis of these "proffers."

greater. (See RU Exh. 8A-I for showing of continued 3, 4, 5 mos. delinquency from 1959 to 1961.) From time to time between September, 1958, and May, 1961, Chief Steward Hines and Business Manager Zicarelli urged complainants to pay up their back dues. (R. 191.) The complainants went to Brodnik who assured them they had nothing to worry about (R. 105).

The seven complainants, in spite of the various warnings, were still behind in their dues payments in 1961.[3] In April 1961 two of the dissidents, Koszowski and Homovec were over a year delinquent while Dudash was four months behind in his dues payment (R. U. Exh. 8A-G) and the other six complainants were three months behind despite the repeated requests of the union for these members to square their arrearages.

Persuasion and admonition proving of little avail, the petitioner was driven to request enforcement of its union shop clause. Rather than seek the discharge of all those behind in their dues, the union decided, however, to initiate a "pilot" step in an effort to "wake up the rest" (R. 207) and therefore requested the discharge of only two delinquent members. The two selected were Homovec and Koszowski, who, after coming off the check-off and paying their dues through Brodnik, had fallen a year or so behind (R. 205-207), and were the two most delinquent.

The petitioner by letter to the company dated April 13, 1961 requested the discharge of these two and they were discharged by the Company on April 14, 1961, but their discharge did not have the desired effect (R. 207) as 20 or so union members did not then come in and pay their delinquent dues (R. 207).

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[3] See G. C. 14A, one of dissidents became 5 months behind & G. C. 14C; R. 282 another becomes 6 mos. behind and is dropped from membership.

Having failed to impress the Brodnik clique by the discharge of Homovec and Koszowski, the petitioner took a larger step. The Company was requested on May 2, 1961, to discharge seven more of those who were behind in their dues, these being the seven whose discharges are of question in this case (R. 207). The Company, on May 3, 1961, discharged all seven of the employees.

At the time of the discharge of these employees, letters requesting the company to discharge seven or eight more had been written by petitioner but were never submitted to the company as the discharges of these seven convinced the rest that the union was determined to get the dues paid, as evidenced by the fact that they all came in and paid their dues. (R. 208.)

On May 4, 1961 the complainants Ed Clark, Anton Dragonic, Mary Jaksic, Betty Sipos, Ann Tomko and Louise Yomnick each paid back dues for the four months of February, March, April and May, 1961, and Joseph Dudash paid dues for five months. (RU 10; R. 313.)

Since on the day after these 7 employees were discharged they came into the petitioner's office and paid their dues, Zicarelli called the president of the company but didn't get the call through to him for several days but then asked him to take these people back. He didn't ask that they be "reinstated to their former or substantially equivalent positions without loss of seniority, or other rights and privileges." He asked the company president to put them back to work. The president answered "No, I am going to hold you to the contract" (R. 211). The company continued to refuse to reinstate these employees. The Trial Examiner would not admit testimony of the reasons for their refusal on the ground "it only becomes material if there is a Board order" (R. 219). The Board paid no attention to the fact that it was the company that refused to

[redacted]ese employees nor to the fact that the Trial Ex-[redacted] had not allowed either the company or the peti-[redacted]ner to go into this matter (R. 215). So the Board made its ruling that the union had not properly requested reinstatement even though the Trial Examiner had refused to allow evidence on the subject.

C. Statement of Matter Involved

1. The Court below decided a federal question in conflict with applicable decisions of this Court when it misapprehended or grossly misapplied the standards of review set forth in *Universal Camera Corporation v. NLRB*, 340 U. S. 474.

The Board decided the basic issue herein that the delinquency was not the real reason but only a pretext for the discharges, saying (R. 11) as follows:

> "Significantly, when on advice of the Union Counsel, the union in April 1961 decided to invoke the union-security clause against delinquent members, it invoked the clause only against the seven complainants, all of them members of the dissident group. *Zicarelli offered no satisfactory explanation why out of some 20 or more delinquent members, he singled out for discharge on May 2nd only members of the dissident group.*" (Emphasis ours.)

The Board's finding above in regard to Zicarelli is not only completely erroneous, but is a negative finding based on no evidence whatsoever and is contradicted by conclusive, competent and credible affirmative evidence. Mr. Zicarelli was found by the Trial Examiner to be a credible witness (R. 34). The Board never held otherwise. Mr. Zicarelli testified without contradiction that all of the 20 some delinquent members were members of the dissi-

dent group of 1958 (R. 190); that only this group of dissident members were delinquent, that there were no other members of the 700 members in the plant who were delinquent (R. 190). The record conclusively shows without any opposing evidence that the union first used a pilot step of two discharges April 13, 1961 to try to get the dissidents to pay up (R. 206, 7) and if the others had paid up then Zicarelli testified there would have been no more requests for discharges (id). When they did not pay up, nor did any of the other 20 some dissident members pay up, the Union then selected seven more to request be discharged (R. 208). If this had not caused everyone to pay up the union would in a couple of weeks have requested seven or eight more be discharged (R. 208). But actually when the seven were discharged they paid their dues and so did the rest of the delinquent dissidents (R. 208). The Board never held Zicarelli not to be not credible nor his testimony not to be credited. Nothing was offered or shown by the General Counsel to oppose this testimony. He did not even allege differently or claim it in his brief (see R. 29 where the Trial Examiner set forth the General Counsel's statement of issues).

The Board in a prior case which it cited several times in this decision, *Puerto Rico Drydock and Marine Terminals, Inc. v. NLRB*,[1] had set forth the proper way for a union to request discharges, as follows:

> "* * * it is probably true that in such a situation [a number of dues delinquent employees who belonged to a dissident group], instead of requesting the dis-

[1] 284 F. 2d 212 (D. C. Cir.) Cert. den. 64 U. S. 883. Citing this case 3 times would indicate that the testimony of Zicarelli was, somehow or other, actually overlooked by the Board, but it was very clearly called to the attention of the Court of Appeals, without avail.

charge of all recalcitrants, * * * the union might properly proceed first by a sort of 'pilot step' * * * that is, it might first request the discharge of a few employees in order to demonstrate the seriousness of its requirements."

The court below and the Board ignored the fact that petitioner, following the advice of its counsel, did follow this procedure (R. 205) in that the union did select two persons who were members of the dissidents and who were most delinquent (R. 206) for a pilot discharge on April 14th and Zicarelli testified, without contradiction, and as a credible witness, at R. 207-8 as follows:

"Q. Why did you have these two, Homovec and Koszowski, discharged prior to the requesting that the other seven be discharged?

A. The reason I don't that (sic) I thought by doing that I would wake up the rest. They knew they were behind. They met together; and they talked together. I thought that by these two leaving, they knew they were going on a bowling tournament, that they would talk it over and maybe before not too long they would all come in and pay their dues. Then my troubles would be over. But that didn't happen.

Q. But that was the purpose—

A. Of—

Q. —of having those two discharged?

A. That is right. But that didn't happen.

Q. You waited then until May 2nd to submit anymore letters, is that right?

A. That is right, sir.

Q. Now, on May 2d, did you have more than the seven people that you were planning to discharge if they didn't pay their dues?

A. I would have had more if they didn't come in and start to pay.

Q. Well, you are answering too early.

A. I'm sorry.

Q. Did you have—about how many other letters did you have prepared?

A. I would say that it was in the neighborhood of approximately seven or eight more to go.

Q. And you sent out only seven letters on May 2d, is that right?

A. That is right.

Q. And were you going to send out the other letters the next day?

A. I would have sent them out possibly two or three weeks later.

Q. You were going to hold them for two or three weeks?

A. That is right.

Q. Did all of those come in and pay their dues on May 3d?

A. They did—they did."

The Board decision ignored this testimony but held that this point that "only dissidents were discharged" was the crux of the entire case (R. 10). Yet the Trial Examiner never had this issue before him because the General Counsel never presented the issue or even suggested it anywhere in the complaint at the hearing or in his brief (R. 29) or in his Exceptions[3] to the Intermediate Report (Appendix D) and never objected when the Trial Examiner excluded this issue from the case (R. 101-103). The Court of Appeals also ignored this issue, despite the Board stating that without this finding there was no cause for holding that dues delinquency was not the real cause

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[3] The Board's Rules and Regulations provide re Exceptions to Intermediate Report (now Decisions) of the Trial Examiner:

"Sec. 102.46 * * *

(b) No matter not included in a Statement of Exceptions may thereafter be urged before the Board, or in a further proceeding."

No party could urge the issue but the Board majority itself inserted it.

of the discharges (R. 10). Somehow the Board overlooked or missed the above quoted testimony that is so vital, is completely uncontradicted and is from a witness found credible by the Trial Examiner[6] while the court below in enforcing the Board order failed to apply the standards set forth in the *Universal Camera Corporation* case, *supra*. This Court in its exhaustive opinion in *Universal Camera Corporation* stated as follows:

> "* * * the Board's findings are entitled to respect; but they must nonetheless be set aside when the record before the Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."
>
> "We do not require that the Examiner's findings be given more weight than in reason in the light of judicial experience they deserve. The substantial evidence standard is not modified in any way when the Board and its Examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced Examiner, who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusions. The findings of the Examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in a particular case; to give it this significance does not seem to us more materially difficult than to heed the other factors which in some determine whether evidence is 'substantial.'"

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[6] The Trial Examiner was C. W. Wittemore (R. 38) who at the time of this decision was the most experienced Trial Examiner with the Board.

The Board's finding on this point comes out of whole cloth and it is in complete contradiction to Zicarelli's testimony and so clearly violates the standards quoted above. Moreover, the Court below by ignoring this issue is in conflict with a decision of another Court of Appeals, namely *NLRB v. Fulton Bag and Cotton Mills*, 175 F. 2d 675 (5 Cir. 1949) which held:

> "In respect to the Board's finding that respondent discriminated against Smith, Rose, Longmire, Kelley and Guthrie, its position is that this finding is contrary to law and particularly to Sec. 5(a) of the Administrative Procedure Act, in that there was neither charge nor complaint of such discrimination and respondent has been in effect condemned without a hearing by finding him guilty of charges of which he had no notice and against which he has had no opportunity to defend."

Further such practice is contrary to the Administrative Procedure Act, is vital to the public interest and is a ruling which if left standing makes those who once revolt against a union immune forever from paying dues. This could have disastrous consequences to all unions and should be corrected now so that this injustice and others will not occur in the future.

2. By upholding the Board order that the dollar bill given away at union meetings as a reward for attendance was a penalty, the Court below decided an important question of federal law relating to the administration of the National Labor Relations Act as amended, which has not been settled by this Court. And in so doing the Court below rendered a decision in conflict with Section 8(b)(1)(A) of the said Act and of Title I of the 1959 amendments to the Act and with the decision of another Court of Appeals. Two dissenting members of the Board, Mr.

Fanning and Mr. Brown, in their expertise, said that the Board's holding on this point was in conflict with these two other portions of the Act. They stated as follows:

> "Poorly attended business meetings, sometimes even a lack of a quorum to proceed, is common to a variety of voluntary associations. In addition to long range educational programs to remedy this situation, many organizations, labor organizations included, have resorted to door prizes, lotteries, refreshments, entertainment, and the like, to make business meetings better attended. Practical business needs as well as the salutary considerations of democratic action for having fuller membership participation in the affairs of voluntary organization are too obvious for explication. In our opinion, moreover, the plain thrust of some of the recent amendments to the Act, Title I—Bill of Rights of Members of Labor Organizations, is to encourage and assure members a more active and responsible role in governing their union and formulating its policy. This role has particular import, and significantly affects the public interest, where the involved union is the exclusive statutory representative of all employees in a bargaining unit. Respondent Union is such a statutory representative.
>
> "Because Respondent Union's by-laws spoke in terms of refunding a portion of dues for attending meetings, our colleagues consider the tie-in with the dues structure as converting the refund into a pro tanto penalty upon those members who do not attend. Essentially, however, such tie-in is not different from the use of union funds, obtained in the form of dues for subsidizing the service of refreshments at meetings or the purchase of door prizes, as a turkey, for example, to be raffled off at a meeting.
>
> "Of course, one may choose to describe the mentioned examples in the language of a penalty on union members who do not attend a meeting, viz, the non-attending member is penalized because, by his ab-

sence, he is denied an opportunity to win a turkey or other door prize, or to partake of refreshments, or, as here, to receive a dollar. We do not so regard these situations. In our opinion, these techniques to stimulate membership participation in union business affairs are legitimate devices to achieve a commendable objective in the operation of labor organizations and are, as indicated above, in implementation of statutory policy. Therefore, in determining the oppropriate nomenclature, here, namely, 'penalty or reward?', we agree with the Trial Examiner that the refund is a reward and so find. We believe, moreover, that by holding otherwise the majority is intruding into Respondent Union's internal affairs in a manner proscribed by the proviso to Section 8(b)(1)(A)."

Sections 1 and 2 of this Title I Labor-Management Reporting and Disclosure Act of 1959 (Appendix A) are similar to Section 8(b)(1)(A) of the Labor Relations Act (Appendix B).

Section 8(b)(1)(A) reads:

"(b) it shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7—*provided, however, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.*" (Emphasis ours.)

The petitioner could do nothing more in line with these statutory provisions than promulgate a rule rewarding members for attending meetings.

The Court below and the Board majority relied upon the case of *Electric Auto-Lite Company*[7] to hold that under

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[7] 92 NLRB 1072 enforcement granted, 196 F. 2d 500 (6th Cir. 1952) cert. denied, 344 U. S. 823 (1952).

the union's bylaws the amount of dues was "only nominally set at $4.00 per month" and that the actual dues were $3.00 per month. The bylaws read as follows:

> "Section 3. The monthly dues shall be $4.00.
>
> Section 4. $1.00 refund of dues collected for attendance of monthly meeting."

The Board then held the dollar refund was a fine or a penalty. The only fact similar in the *Electric Auto-Lite Company* case to the instant case is that it involves attendance at union meetings. The facts in the instant case are *apropos* to the Court of Appeals (Third Circuit) decision in *NLRB v. Bakery and Confectionery Workers*, 245 F. 2d 211 (1957), which overruled the Board and held that a discount for early payment of dues was merely an exercise on the part of the union of the right expressly given to it under the Act of prescribing its own rules[8] concerning the acquisition or retention of its membership. The court further said "a review of the entire record finds it barren of evidence to support the burden of the Board to show that the increase did not represent dues." Further, "in fact the record contains affirmative evidence that respondent's discount procedure was intended not as a punishment, but rather as a real inducement and reward for the prompt payment of monthly dues."

In the present case the entire record is barren of evidence that the one dollar "refund" is a fine or a penalty and the record contains substantial affirmative evidence that the one dollar gift at union meetings was not intended as punishment but "rather as inducement and reward" for attending the monthly meeting (R. 200, 201).

As the two Board members pointed out in their dis-

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[8] The court was referring to the same Section 8(b) (1) (A) quoted above.

sent, the entire thrust of the 1959 amendments was to help unions and their members in their efforts for more democracy in unions. The gift of money at union meetings is an inducement to bring members to meetings. There is nothing morally wrong about it and it should not be held to be a legal wrong based on a technicality and that's what the holding of this case is. This is an important problem to all unions because efforts toward making democracy work are important and this is one small but salient effort that should be allowed.

3. The Court below in upholding the Board's finding that the union grace period was "at least 3 months" (i.e. the union could not have anyone discharged unless they were 3 months delinquent in dues), where the union's constitution specifically stated employees in factories, such as Leece-Neville Co., had only 21 days grace, is in defiance of the standards set forth in *Universal Camera* case, *supra*.

The provisions in the constitution are clear. They read as follows (General Counsel's Exhibit No. 6—R. 261):

> ARTICLE XXIII—Members in Arrears
>
> "Sec. 3. Any member indebted to his L. U. [i.e. local union] for three months' dues, or having any past due indebtedness to the I. B. E. W. for dues or assessments, shall stand suspended, and the L. U. may refuse to accept dues from any member who is indebted to it. Such member cannot be reinstated until all indebtedness has been paid, unless waived by the L. U. However, dues cannot be waived.
>
> (However, when a 'BA' member is working under an agreement requiring monthly payment of dues, a grace period of only 21 days—after the first of the month following the indebtedness—shall be allowed unless the grace period is extended by the L. U. involved.)"

"Sec. 4. Any member indebted to his L. U. for six months' full dues shall be dropped from membership by the F. S. and cannot become a member in good standing again in the I. B. E. W. except by joining as a new member."

There are three separate and easily understandable provisions. These delinquents and almost the entire membership in this plant were "BA members," i.e. members who chose not to be covered by the insurance and pension plans of the International Union (R. 192). The 21 day grace period was voted into the constitution to cover manufacturing members (as in Leece-Neville Co.) as distinguished from the construction industry members (R. 327, R. U. Exh. 12-A).

The constitution governs the local and its members. The dissidents, including the seven dischargees herein, used the constitutions for asking question at union meetings (R. 192) and without doubt knew the provisions of the constitution. Also 1200 copies of constitution were passed out at the Leece-Neville plant and were always available at union meetings (R. 192).

The Board quoted 3 letters sent by Mr. Zicarelli in 1958 (R. 279, 280, 281, 282, G. C. Exhs. 12, 13, 14A & C) wherein he quoted section 4 above—the six months delinquency (R. 192) clause and a reinstatement clause as proving that the union "considered the grace period to be at least 3 months." (R. 10.) There was nothing in the record to show the union ever considered the grace period for BA employees to be 3 months. This finding is based on nothing and clearly precludes the "Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both" as required by this Court through *Universal Camera Co., supra.*

4. The Board held that this petitioner followed a "lax policy with respect to collection of dues" (R. 9) and later found that "we believe, moreover, that the Union has waived any right it may have had to secure the discharge of these employees because of their alleged delinquencies" (R. 11).

Again, there is nothing in the record to support this finding. These dissidents who were 20 to 30 in number (R. 11, 190, 205), either made their tenders of $3 twice in 1958, or had theirs commingled with $3 payments; then sent the returned money to a lawyer; never attempted to pay the dues again, but kept getting more and more behind in their dues. Mr. Zicarelli was patient with them, he talked with some, he had the steward talk with others (R. 191) and some of the dissidents responded to this treatment and paid their delinquent dues (R. 204) but finally in April 1961 his patience was exhausted; Koszowski and Homovec were over a year delinquent (R. 206) and the others were running four or five months delinquent (R. 296). The discharge of Koszowski and Homovec as a pilot step was requested and obtained (R. 207). It failed to bring in the other delinquents who remained 4 or 5 months delinquent (R. 296, R. U. Exh. 8a-g) and so after two weeks the discharges of 7 more were requested and obtained (R. 208). It was stipulated with the General Counsel that this petitioner, before the discharge of Koszowski and Homovec, never asked or requested the discharge of anyone for not paying dues (R. 223). So the "policy of laxness" is just not true because of 700 employees only these dissidents were delinquent and the union was trying to work out this serious problem fairly and was trying to get them back into the fold. To hold this to be "laxness" and a waiver of the right to enforce the union-shop clause is a serious encroachment on the contractual rights of the petitioner.

For a union to be patient with its delinquent members, to talk with them, to let the matter ride hoping not to have to use the union-security provisions against them, and then as the delinquency grew to take first a pilot step by causing the 2 most delinquent to be discharged and when this did not cause the other delinquents to pay up, to take seven more of the 20 some delinquents and ask the Company to discharge them, is now an unfair labor practice. This decision is an instruction to unions to be brutally strict in enforcing union-security clauses for otherwise they may waive the right.

This is a gross misapplication of the standards set by this Court, when the only evidence as to the union's purpose in starting the discharge procedure was the uncontradicted and credible testimony, again, of Mr. Zicarelli who testified that he made his decision when, knowing two of the dissident members were over a year delinquent, he saw the others "falling back four, five months delinquent" (R. 205). (Respondent Union's Exh. 8a-g shows the progressive delinquency of the 7 dischargees involved herein.)

No union could continue any further in its patience and lenience—but now this very patience grants immunity from paying dues to a core of dissidents. This is an order to everyone in the plant to join the dissidents if they want to quit paying dues and become free riders and puts the Board in the position of intervening on one side of an internal union dispute and makes a travesty of the union contract.

This decision is dangerous to all union officers who have some compassion—and on the other hand it is food for the tyrants in union office.

5. The decision of the Board below was in conflict with the decision of this Court in finding that conduct

which occurred within the 6 months limitation was an unfair labor practice, solely through reliance on its finding of an earlier unfair labor practice which is barred by time from being asserted as a basis for complaint. The Court of Appeals in affirming made no mention of this briefed point. Unfair labor practices in 1958 were, the Board found herein, that the union assessed an illegal fine or penalty against its members and refused dues deducting the dollar "penalty." The charges were filed in 1961. The complaint alleged as follows:

> "The real reason for respondent union's demand for the respondent employer to discharge said individuals was its insistence that said individuals and other employees pay a fine assessed against them for non-attendance at union meetings."

This is not a case of earlier events being utilized to throw light on unfair labor practices. For the Board to base their holding on this unfair labor practice of three years prior to the charges being filed is a complete misconception of the purpose and meaning of the six months limitation and is the same misconception of the "continuing violation" as this Court criticized and held unjustified in *Local Lodge 1424 Machinists v. NLRB*, 362 U. S. 411 (1960) where the Board held an illegal union security clause rendered a contract illegal forever and that the General Counsel could issue complaint anytime thereafter without regard to the six months limitation in Section 10(b). This Court said:

> "It is doubtless true that Section 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of Section 10(b) requires that two different kinds of situations

be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. *The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice.* There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice * * *.

"The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.

"Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that Section 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events 'after records have been destroyed, witnesses have gone

elsewhere, and recollections of the events in question have become dim and confused.' H. R. Rep. No. 245, 80th Cong. 1st Sess., p. 40, and of course to stabilize existing bargaining relationships."

Presumably if the union had caused the Company to discharge employees for non-payment of dues in the *Lodge 1424* case the ruling of the Supreme Court would be the same. In that situation the facts would be the same as in the instant case.

We believe the 1958 'fine' was barred by the 6 month limitation in the Act and if the fine was barred, the so-called tenders were properly rejected in 1958 and each dischargee was 4 or 5 months delinquent in dues and were even past the Board's determination that the grace period was "at least 3 months" and so were properly discharged by the Company on request of the petitioner under any theory of the Board.

6. The Board and the Court below disregarded 2 union requests for the Company to re-instate the 7 dischargees because the one oral and one written request were not stated in legal language.

They went to the union and paid their dues and Mr. Zicarelli called the president of the company and told him he would like to have these people rehired as they were all in good standing with the union. The company failed and refused to reinstate them at that time and a couple of months later, Mr. Zicarelli sent a letter to the company again asking it to rehire these people because they were in good standing with the union. Finally in December 1961 the company called them to work. The Board held that the union may terminate its liability for back pay only by a clear and unambiguous request for reinstatement of the complainants to their former or substantially equivalent employment saying "This the union failed to do"

(R. 15). The only testimony in regard to the reinstatement or failure to reinstate of these people is the following credible testimony of Mr. Zicarelli. The questioning was by counsel for the company (R. 215).

> "Q. I just remind you that in this particular letter you requested, rather you advised that these members had become good members in good standing with the Union; that you have no objection to their being hired, in fact, you requested that such be done, is that true?
>
> A. That is right.
>
> Q. In that regard, did you have any discussions with anyone as to just where these people would fit in at Leece-Neville with regard to continuous service, seniority, job preference and things of that matter?
>
> A. No, sir."

So the Board in finding that the petitioner did not correctly request reinstatement of the employees is making a finding in direct conflict with the evidence of a credible witness and based upon no evidence whatsoever. Mr. Zicarelli testified, without contradiction, that he called the president the day following the discharges but that he couldn't get the call through to the president for three or four days.

Mr. Zicarelli's testimony (R. 211):

> "Q. And what did you say to him and what did he say to you?
>
> A. I said: "Mr. Neville"—I said; 'I wish you would take these people back. They are in good standing in the Union now.' He said; 'Nope. I am going to hold you to the contract.'"

But because the petitioner did not ask that the dischargees be reinstated "to their former or substantially equivalent positions" the Board held that their request was insufficient to cut off the Union's liability for back pay (R.

69). Such a requirement that certain specific language be used by a non-lawyer making a request is in conflict of this Court's decision where the Board was overruled because it required that the union-security clauses be in the exact wording the Board specified. This Court in *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB*, 365 U. S. 667 (1961), reversed a Court of Appeals which had upheld a Board order wherein the Board had set forth certain requirements for a legal hiring hall and held that the hiring hall arrangement of the union in that case was illegal because it didn't contain those specific provisions the Board required. This Court held that discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against employees because of the presence or absence of union membership. And further this Court said, "we cannot assume that a Union conducts its operations in violation of law and that the parties to this contract did not adhere to its expressed language. Yet we would have to make those assumptions to agree with the Board that it is reasonable to infer that Union will act discriminatorily." We think in effect this decision is contradicted by the Board's decision in the present case because here the Board is requiring that the union in requesting reinstatement of the employees use the exact language used by the Board in its orders in regard to reinstatement. Thus it is inferred that the Union did not want these employees reinstated to their former positions and yet there is not one bit of evidence of this. In fact, the evidence is to the effect the Union did want these people back in their jobs in their former positions and with former seniority because they were now fully paid up in their dues. So the Board is again inferring illegal actions contrary to positive evidence in direct conflict with a decision of the court.

VI. ARGUMENT

A. THE BOARD'S DECISION WAS NOT JUSTIFIED BY A FAIR ESTIMATE OF THE WORTH OF THE TESTIMONY OF WITNESSES.

The Trial Examiner after making extensive findings of fact and carefully reviewing the issues as presented by the General Counsel in his brief, recommended that the complaint herein be dismissed entirely (R. 27). The Board split 3 to 2 on the case with two Board members writing a dissenting opinion in accord with the Trial Examiner's findings (R. 20). The Court of Appeals based their decision entirely on the Board majority's reasoning. Therefore, we will analyze the Board decision and compare the other 3 decisions with it.

1. The Board Held That the Union's Dues Were Not $4 a Month, but Were $3 a Month Plus a $1 Fine for Not Attending the Union's Monthly Meeting.

The Board based its holding on the fact that the $1 gift was mentioned in the by-laws with the dues. The by-laws read: "Section 3. The monthly dues shall be $4.00. Section 4. $1.00 refund of dues collected for attendance of monthly meeting." The record shows uncontradictedly that the $1.00 was paid by the union at its meetings by dollar bills being handed out at the door to everyone attending the meeting (R. 200). Nevertheless, the Board majority held that the $1.00 was a fine for not attending the meeting. The Board gave no credence to the union's notice in May 1958 posted on plant bulletin boards stating: "The dues are uniformly established at four dollars ($4.00) per month * * *" (R. 31). The Board majority also ignored the Trial Examiner's finding of fact that since 1944 the uniform monthly dues up to the time of the hearing had been $4.00 (R. 31).

The Board majority held that this situation is the same as in the *Electric Auto-Lite Company* case, *supra*, which was enforced by the Sixth Circuit and denied certiorari in this Court. These situations are not alike. The statement of facts in the *Auto-Lite* case is as follows:

> "Testimony on behalf of the Union indicates that in September, 1946, the membership of the Auto-Lite Unit of the Respondent Union, duly passed a motion increasing the regular monthly dues from $1.50 to $2.00, with the further provision, however, that those members who attended each of the monthly union meetings would be exonerated, upon appropriate evidence, from the payment of the additional 50 cents. The minutes of the meeting at which this resolution was adopted was not introduced as evidence. In practice, the record shows the additional charge of 50 cents did not become due until after a member had failed to attend a meeting. Those present at the meeting received attendance cards which furnished the basis for their exemption from paying the 50 cent charge. Significantly, this attendance card indicated that a '50-cent assessment' would be levied for non-attendance. The constitution of the International Union provides that the dues of each member shall be $1.50 per month, without indicating that local unions, or any subordinate body thereafter, may increase this amount. The constitution also specifically authorizes the levying of 'fines' for non-attendance at membership meetings."

In *Electric Auto-Lite* the facts showed a fine levied upon evidence of non-attendance. Here in contrast the dues were and are $4.00. One dollar was given as a gift for attendance and the cash was obtained by a check on the treasury and the money was passed out to those attending the meeting (R. 200).

In *Electric Auto-Lite* also the discharged person refused to pay the 50¢ fine for months at a time but paid

his dues. He was discharged for not paying the fine. Here, not one of the seven discharged persons ever complained of the $1.00 refund but tried to cause confusion by deducting the $1 from their dues without going to the meeting or refusing to accept the giveaway at the meeting (R. 201) thus frustrating completely the purpose of this gift. Brodnik, Sturtz, Norma Clark and Mary Bank could not attend union meetings from May 1958 on.* They kicked because they could not get the $1.00 by attending meetings and they "took the buck" first, and sent in $3.00 as their dues. They were protesting not the $1.00 refund, but their being unable to attend meetings. Actually everyone knew their dues were $4.00 and all accepted it.

The Trial Examiner distinguished *Electric Auto-Lite* (R. 37) saying:

> "That only by strained and painful reasoning could a conclusion be reached that a reward if not received, by nature thereupon becomes a penalty. Consistent with the unreasonable conclusion would be one equally awry, that the uniform dues in this case actually were only $3.00, and this General Counsel does not specifically claim. Indeed not until his second of several amendments to the complaint did it apparently occur to him to allege that the 'real reason' for the discharges was the Union's 'insistence' that employees pay a fine assessed against them for non-attendance at union meetings."

The Board minority said that giving this $1.00 to overcome the small attendance at Union meetings was the same as giving a door prize or refreshments, or conducting a lottery for prizes, and that the "plain thrust" of some of

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* Mary Bank was expelled by petitioner in May 1958, after trial and Sturtz, Brodnik and Mary Clark, after trial at which they did not appear in person or by their counsel, had been suspended from attending meetings for 3 years (R. 111).

the 1959 amendments to the NLRB particularly Title I—Bill of Rights of Members of Labor Organizations, "is to encourage and assure members a more active and responsible role in governing the Union" (JA 21a).

This is a very worthwhile point. The "thrust" of Title I is contained in its Sections 1 and 2 which read as follows:

> "Sec. 101. (a) (1) EQUAL RIGHTS.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, *subject to reasonable rules and regulations in such organization's constitution and by-laws.*
>
> (2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.*" (Emphasis added.)

What could be a more reasonable rule than one setting up a gift for attending meetings.

The Board minority further stated (R. 22), "Therefore in determining the appropriate nomenclature here namely, 'penalty or reward,' we agree with the Trial

Examiner that the refund is a reward and so find. We believe, moreover, that by holding otherwise the Board majority is intruding into Respondent Union's internal affairs in a manner proscribed by the proviso to Section 8(b)(1)(A)." This section reads "(b) It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees—*provided, however, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.*" The "thrust" of these insistences by Congress on the right to prescribe proper rules should be buttressed by Board decisions, not ignored nor avoided.

The *Electric Auto-Lite Company* case is not apropos here. More like the instant situation is the Third Circuit decision in *NLRB vs. Bakery and Confectionery Workers*, 245 F. 2d 211 (1957) which approved the approach of the Board minority opinion therein and overruled a Board majority decision saying:

> "What the union has done is simply to make the amount of dues contingent upon the date of payment. Members may pay before the last day of the month and take advantage of a one-dollar discount. They may exercise their option to pay within the next fifteen days at full amount. The plan affects every member of the union, and the option comes into play every month. There is no question that a union may lawfully increase its monthly dues by one dollar. The majority of the Board concluded, however, that the extra dollar was an assessment because the respondent did not attempt to justify the increase as a revenue-producing measure. We think this was placing an improper burden upon respondent, for by increasing its dues it was merely exercising the right *expressly given* to it under the Act of prescribing its

> own rules concerning the acquisition or retention of its membership. 29 U. S. C. 158(b)(1)(A). At all times the burden was upon the Board to show that the increase did not represent dues. A review of the entire record finds it barren of evidence to support this burden. In fact, the record contains affirmative evidence that respondent's discount procedure was intended not as a punishment, but rather as a real inducement and reward for the prompt payment of monthly dues." (Emphasis the court's.)

In the present case the entire record is barren of evidence that the one dollar "refund" is a fine and in this case also the record contains substantial affirmative evidence that the one dollar gift at union meetings was not intended as punishment but "rather as inducement and reward" for attending the monthly meeting (R. 200).

2. The Board Found the Tenders in 1958 to be the Same as Payment and Said the Commingling Was Proper.

The Board majority having found the $1 to be a fine now made two corollary findings.

First, the Board held

> "the tenders of dues in the amount of $3.00 made in May 1958 were valid tenders."

The only members who tendered $3.00 as dues in May, 1958 were Jaksic and Sipos for whom Sturtz had tendered $3.00 for their May dues and Sturtz admitted that she was doing this to harass the Union (R. 80). Further evidence that it was planned harassment is shown by the General Counsel who in his third amendment to the Complaint alleged (R. 249):

> "7. (A) On May and June, 1958, Respondent Union refused to accept the tender of May dues on behalf of employees Mary Jaksic and Betty Sipos for the reason that the amount tendered was $3.00

instead of $4.00. *Jaksic and Sipos having declined to accept the $1.00 cash reimbursement offered them by Respondent Union when they attended its monthly membership meeting.*" (Emphasis added.)

Refusing to accept the dollar bill that was handed to everyone at the meeting and sending $3.00 for dues instead of $4.00 was harassment without question and would snarl the union books no end and the harassed union would not need Sturtz's admission that it was intended as harassment.

The two dissenting Board members said, "The Record establishes that the dissident group, by withholding the proper dues, commingling their dues payments, and remaining delinquent for a period of two years were attempting to harass, irritate and embarrass the union," (R. 22).

The Trial Examiner held (R. 37), as follows:

"Nor can the Trial Examiner agree with General Counsel's claim No. 2—to the effect that the Union was not privileged to reject certain tender of dues, in blanket form, by Brodnick and Sturtz, as described herein. Nothing discernible in the Act empowers the Board to police accounting policies, either of employers or unions, unless such policies in their application are clearly shown to be unlawful. The senders of the blanket money orders, containing some dues less than the proper amount, were notified of the reasons why such were not acceptable, and no subsequent efforts were made to straighten out the matter. Employees who accept Brodnick's assurance, even if they understood from her that such assurance was based upon 'legal advice,' that merely sending in the blanket check constituted payment, did so at their own risk."

We believe the Board was correct and the dissenting members were right.

The *second* corollary finding of the Board was that "the tender of dues in the amount of $4.00 in the summer of 1958, rejected by the union on the ground that it was commingled with the tender of dues in the amount of $3.00 was likewise a proper tender, inasmuch as there was in fact *no commingling* of sufficient and insufficient tenders of dues." (Emphasis ours.)

This Board majority finding completely overlooked the fact that commingled with the dues of the dischargees and the other dissidents in July 1958 were $3.00 dues tendered for Rose Brodnik herself (R. 310 1st column left, 11th name) who the Board majority found was a "well-known suspended member of the Union." Her dues, of course, were not acceptable by the petitioner but were commingled in these tenders, and so there was wrongful commingling.

In July 1958 also, $3.00 was tendered for Sturtz (R. 311 an extension of 2d column of 310). Sturtz was also a suspended member of the Union (R. 85) and her "dues" could not be accepted. This was an added element of commingling the wrongful with the proper and acceptable.

In July 1958 also, $3.00 was tendered for Mary Banks (R. 311, 2d column from the left). Banks was an expelled member of the Union (R. 103) and, of course, the Union could not accept her dues.

In August 1958 also, $3.00 dues were tendered for Sturtz and Banks.[10]

So how could the Board majority possibly hold that there was no wrongful commingling in these tenders?

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[10] It might be noted here that although Sturtz and Brodnik and Banks were leaders of the dissidents in 1958 through 1961, and had been suspended or expelled from the Union, they all continued working for the Company.

The Board majority, however, used the language: "No commingling of sufficient and insufficient tenders of dues." If the Board majority was making a distinction between "wrongful" and "commingling of sufficient and insufficient tenders" it didn't say so and we see no difference. There was commingling of dues for Brodnik, Sturtz and Banks in the amount of $3 with the other dues of $4. It was still wrongful commingling, justifying the Union in sending it back and this makes all the tenders in May, June, July and August 1958 wrongful and not proper and valid.

The Court of Appeals answered this argument by saying there was commingling and the union in one letter (R. 273) rejected the offered dues for that reason but says "however it is clear from the record that the Union's basic reason for the rejection was its insistence that the dues were $4.00 and the $1.00 refund must be obtained at the meeting" (Appendix p. 78 herein). We respectfully submit that this does not change the Board's wrongful finding that there was no commingling of proper and improper dues.

Since it was improper commingling it was properly rejected and the Court of Appeals' reasoning is not material. The Court below was wrong when it further said: "And it must be noted that had the members whose tenders were rejected by the aforementioned letters resubmitted dues in the sum of $3.00, those tenders would have been rejected." Mr. Zicarelli testified again without contradiction that in September 1958 the union started to send only the $3 back and to keep the $4 payments when they were sent in commingled thereafter.

3. **The Board Majority Then Held "As We Have Found that the Tenders of Dues in 1958 Were Valid Tenders, the Union Improperly Applied Subsequent Payments Made by These Employees * * *."**

All that "improperly applied subsequent payments" means is as the Trial Examiner in his 16th Findings of Facts said "It was stipulated during the hearing that it was the Union's consistent procedure to apply any dues received from any member to the earliest month for which its records showed no payment as having been made" (R. 34).

But now the Board majority adds up the delinquencies of the seven dischargees according to its finding that the 1958 tenders were proper. The Board majority had heretofore said (R. 5) "On May 1, 1961, the Union's books show that all of the complainants, except Dudash, were in arrears in paying of their dues for the months of February, March and April 1961, while Dudash was shown to be in arrears for these months and for the month of January 1961."

Now the Board majority by taking away 2 months from each dischargees delinquency by their holding that 2 months tender in 1958 were valid tenders held (R. 8) "Consequently all complaints, except Dudash on May 2, 1961, when the Union asked for their discharge were in arrears in payment of dues only for the month of April. Dudash was also delinquent in payment of dues for the month of March." This also means the Board is not counting the dischargees delinquency for the month of May 1961—despite the record.

4. So the Board Majority Then Held "the Dues for the Month of May Did Not Become Due and Payable Until Friday, May 5."

To so hold the Board majority had to somehow rule out the fact that the International Constitution in effect in 1961 had a clause therein as follows (R. 197):

"Article XXIII, Section 1, L. U's (Local Union's) shall collect dues from members either monthly or quarterly *in advance.*" And the Local Union until November 1959 had a by-law reading: "Section 5. Dues are payable monthly in advance." This was left out in the 1959 amendments because the International Constitution so provided and it governed the local so it was not needed in the local by-laws (See R. 326 Section 7).

The Board majority overruled this Constitutional provision by stating (R. 8) "The dues for the month of May did not become due and payable until Friday, May 5." The Board majority explained this finding (Footnote 6, R. 8) as follows:

> "In its notice to members posted in *1958*, the Union announced that the dues were due 'the first Friday of each month' and could be paid either directly or by mailing checks to the Union." (Emphasis added.)

The full sentence in this notice of which the Board majority quoted only a part reads as follows, as quoted from the Trial Examiner's report where it was quoted in full (R. 31 and footnote).

> "The dues are uniformly established at $4.00 per month and due the first Friday of each month."

The Board majority is using the second half of this sentence written in May 1958 to eliminate from the dischargees their necessity to pay May dues on May 1, 1961 and yet it ignored the first half of the sentence when it found the dues were $3.00 a month in 1958 in direct con-

tradiction to this notice. The Board majority is drawing two contradictory conclusions as to the evidentiary weight of this sentence in this notice. The Board majority gives no reason for holding the first half of this sentence to be untrue or for holding the second half to be true. If the Board majority had found the May dues to be due on May 1, 1961, they would have had to find Dubash three months in arrears and thus dischargeable even under their theory that the petitioner could only discharge under its 3 month clause, despite their prior cancelling of 2 months of his delinquency by finding that the 1958 dues tenders were the same as dues payments. Yet this 1958 notice was not applicable in 1961 because the quotation from the International Constitution shows it was incorrect and Zicarelli, the union's general manager, who was found by the Trial Examiner to be a credible witness, testified that since May 1958 he had communicated to the members by announcements at meetings the constitutional provision above so as to advise all members that dues were payable on the first day of the month (R. 185) This testimony was uncontradicted and by a witness the Trial Examiner found credible.

5. **Now Having Eliminated the Possibility of Any of the Dischargees Being 3 Months Delinquent by This Sort of Bookkeeping the Board Majority Now Called the Petitioner Lax and Said It Had No Consistent or Uniform Practice With Respect to Suspension of Membership for Delinquency in Payment of Monthly Dues, and That the Union Considered the Grace Period to Be at Least Three Months (R. 8-10).**

The Board majority said (R. 9):

"The record thus shows that the Union followed a lax policy with respect to collection of dues, and had no uniform or consistent policy with respect

to suspension from membership for nonpayment of dues. It is nevertheless clear that at all times relevant to this proceeding the Union considered the grace period to be at least 3 months; and at the time of the discharges, none of the dischargees was in fact delinquent for that long a period."

This position of the Board decision is a hodgepodge of fact and fancy and does not prove what the Board held. The Board's remarks about "lack of policy," or "a lax policy" are meaningless and actually not relevant. The petitioner admittedly did not go as far as to request discharge of these dissidents or any of them until April 13, 1961—but the petitioner had never had anyone discharged in its existence at Leece-Neville Co. (R. 223). It had let Sturtz and one or two others drop their membership after becoming six months behind in dues pursuant to its constitution—but again does this mean all employees can do this? Or that by allowing it to two or three it must be granted to anyone? However its leniency or kindness or "laxness" to these members is not material. It was trying to get the dues paid by letters, by oral persuasion by the steward and by its manager. So in April 1961 it decided on more stern measures. It had to by then. It had a tough situation with these dissidents and was handling it slowly and patiently. But equally wrong with this portion of the Board majority ruling is the finding that "the Union considered the grace period to be at least three months." This ruling is based upon nothing whatsoever.

There is absolutely nothing to show the petitioner relied on anything but the 21-day clause. It asked for the discharge of these members by the same letter, different only as to the employee named (R. 331, 209, 210).

The by-laws provide (R. 261):

ARTICLE XXIII

MEMBERS IN ARREARS

"Sec. 3. Any member indebted to his L. U. [Local Union] for three months' dues, or having any past due indebtedness to the I. B. E. W. for dues or assessments, shall stand suspended, and the L. U. may refuse to accept dues from any member who is indebted to it. Such member cannot be reinstated until all indebtedness has been paid, unless waived by the L. U. However, dues cannot be waived."

(However, when any "BA" member is working under an agreement requiring monthly payment of dues, a grace period of only 21 days—after the first of the month following the indebtedness—shall be allowed unless the grace period is extended by the L. U. involved.)

"Sec. 4. Any member indebted to his L. U. for six months' full dues shall be dropped from membership by the F. S. and cannot become a member in good standing again in the I. B. E. W. except by joining as a new member."

These dissidents, all 30 of them were "BA" members, i.e., members who chose not to be covered by the insurance and pension plans of the International Union (R. 192). The 21-day clause was put in the Constitution according to the procedures of the International Convention in 1954 (See Union's Exhibits 12-A, B, C, R. 327-30) because in manufacturing companies (such as Leece-Neville Company) and utility companies,

"we have agreements containing union security clauses. These require union members to pay their dues monthly. However, some employers have interpreted our Constitution to mean that we cannot discipline anyone for non-payment of dues until after six months. The National Labor Relations Board has also ruled that our Constitution supersedes the agree-

ments which require monthly payment of dues. Therefore, I recommend that the following paragraph be added to Sections 3 and 4: 'A grace period, however, of only 21 days shall be allowed—after the first of the month following the indebtedness—where the member is working under an agreement requiring monthly payment of dues,'" (Signed by the president of the International Union).

In *Leece-Neville* too the dues had to be paid monthly as shown above.

The Constitution including the 21-day provision, governs the local and its members. Its members, including the dissidents, are presumed to know of the 21-day provision. Ignorance of the law has never before been an excuse in Board hearings any more than elsewhere. Copies of the Constitution were available to each member; they were given away at meetings and in the Stewards office at the plant (R. 191).

This finding of the Board majority that the Union had a lax policy with respect to collection of dues and had no uniform policy with respect to suspension for nonpayment of dues and considered the grace period to be 3 months was not correct. The union had no policy until now except for one or two it let drop out after becoming 6 months delinquent because these dissidents were its only delinquents. (R. 190.) A finding should have been made that there was a 21-day delinquency provision and that each dischargee was over 21 days delinquent.

The Board minority did not mention the 21 day, three months or six months provisions. They did state (R. 22) "Even though a union may have been lenient or even lax in enforcing union-security provisions of the contract, there is no requirement in law or fair dealings that it must continue to be so." The Board minority also footnoted this point as follows (F 23, footnote 19): "*North Ameri-*

can Refractories Company, 100 NLRB 1151, 1155 ('nor does the fact that the respondents have previously permitted delinquent members * * * 15 additional days to pay dues by a liberal application of their Union's security clause mean that they were thereafter required to extend the same leniency to all delinquent members as a fixed application of law.') *Standard Brands Inc.*, 97 NLRB 737."

This issue of laxness was never alleged by the General Counsel and so the Trial Examiner had nothing to say about it and he did not say anything regarding the 21 day clause nor did the dissenting Board members.

6. The Board Then Held That the Petitioner Had Waived Its Right to Have the Seven Persons Discharged.

This entire finding of the Board majority is as follows (R. 11):

> "We believe, moreover, that the Union has waived any right it may have had to secure the discharge of these employees because of their alleged delinquencies. Ever since September 1958 and until April 1961, the complainants made their successive payments of current dues through collector Brodnik on the assumption that their tender of dues for 2 months in 1958 was a valid tender. The Union accepted these successive payments of dues with the knowledge of such claim, but adhering to its position that the tender was invalid, back-dated such payments by 2 months. Such a state of affairs continued without any change until the Union's decision to invoke the union-security clause against the complainants. After Zicarelli's letter of September 10, 1958, complainants Draganic, Sipos, Clark, Tomko, and Yomnick were never contacted by any Union agent concerning the subject of dues delinquency. Jaksic and Duda h testified that they were approached in July 1960 and February

1961, respectively, by the Union agents, but when they told the agents that the Union refused the tender of dues for 2 months, the subject matter was dropped. Having unlawfully refused to accept from the complainants the tender of 2 month dues in 1958, and thereafter for some 30 months having accepted their successive payments of current dues with the knowledge of their claim that the tender was lawful, the Union in our opinion is barred from reversing its position and invoking the union-security clause without an adequate notice to the dischargees."

Without disputing this sentence by sentence, we call attention to the Trial Examiner's Findings of Fact on these points (R. 33):

"12. On September 10, 1958, the Union's business manager wrote to each of 30 employees including all of the seven herein involved, warning them of by-law provisions for suspension when three months in arrears, and pointing out the specific months for which their dues were delinquent. Most of this number promptly went to the Union and squared accounts at once.

"13. There is no evidence that any of the seven employees here involved after receipt of the union letter of September 1958 protested to any Union official or representative made any grievance or accounting move regarding the business manager's official notice to them of their delinquency, nor did they again attempt to pay, directly or indirectly, the dues for July and August 1958 first submitted through Brodnik.

"14. There is evidence that at least some of them queried Brodnik at the time, and although aware that she herself had been suspended from the Union, rested upon her assurance that 'legal counsel' had told her that they had nothing to worry about since their dues had been lawfully tendered even if rejected.

"15. From September 1958 until early in 1961, the Union accepted the successive months dues of $4.00 from each of the seven employees, but returned receipts showing that such payments were being applied two or more months back—to the month following the last, according to Union records when proper dues had been received and accepted.

"16. It was stipulated during the hearing that it was the 'Union's consistent procedure to apply any dues received from any member to the earliest month for which its records show no payment as having been made.' Thus, it is clear that at all times since September 1958, the seven dischargees had been reminded once a month when receipts reached them of their delinquency according to their Union records.

"17. It was also stipulated at the hearing that at no time has the Union requested monthly dues of $3.00 from any individual.

"18. According to the credible testimony of Business Manager, Zicarelli, in February 1961, there were about 20 employees, of the many hundreds at the plant, who were delinquent in payment of their dues. He and the chief steward spoke about the matter directly to some of this number, including Dudash, one of the seven here involved. Some of the delinquents paid up."

The union's position was maintained throughout from 1958-1961 that these men and women were delinquent, and as the Board itself stated, "The Union accepted these successive payments of dues with the [illegible]wledge of such claim, but adhering to its position that the tender was invalid, backdated such payments by two months." The Board majority is inconsistent—not the union. The dissidents through their attorney were withholding payments—but the Board is consistently putting all the onus on the union.

The Board minority did not mention this point.

These fact findings of the Trial Examiner were never even mentioned by the Board but it had to disregard them in order to reach such a conclusion that a "waiver" had occurred.

The Court of Appeals however said "* * * and the Court could have based its affirmance of the Board's order regarding the Union on this point alone, there is substantial evidence in the record to support the Board's finding that the Union, by its conduct from September 1958 through April 1961 waived any right it might have had to secure the discharge of these seven employees because of their alleged delinquencies." We believe this is unfair to petitioner and to other unions whose officers do not wish to have members discharged immediately on becoming behind on their dues. This is a harsh ruling and should be reversed.

7. The Board Now Held the Delinquencies Were Pretexts.

The Board now held that invoking a union-security clause to secure the discharge of a delinquent member does not per se constitute conclusive evidence of discrimination. Then it said "the test, as in all cases of discharge, is whether the real reason for invoking the union-security clause is the delinquency of a particular member whose discharge is sought by the union or the delinquency is used merely as a pretext for discrimination against him" (R. 10). Then it found that the delinquency was only a pretext for the discharges requested by petitioner. This the Trial Examiner had held not to be an issue and the General Counsel agreed with him (R. 101-103). The Board nevertheless ruled that there was discrimination and therefore the delinquency in dues was a pretext. The General Counsel never put in any evidence on this and the Board ruled

on no evidence—it held there was negative evidence—but there was not. The Board said:

> "Significantly, when, on advice of the Union counsel, the Union in April 1961 decided to invoke the Union-Security clause against delinquent members, it invoked the clause only against the seven complainants, all of them members of the dissident group. *Zicarelli offered no satisfactory explanation why out of some 20 or more delinquent members he singled out for discharge on May 2 only members of the dissident group.* Upon the entire record, particularly in view of the Union's policy and practice of leniency in collecting dues in arrears, and singling out for suspension only members of the dissident group, we find that the Union invoked the Union-security clause against the complainants for reasons other than their delinquency of 1 or 2 months duration in payment of dues." (Emphasis ours.)

The major error which renders the entire decision of the Board in error is that Zicarelli did *not* "out of some 20 or more delinquent members" single out for discharge on May 2 "only members of the dissident group." *All of the some 20 or more were dissident members. Only dissident members were delinquent* (R. 190). This is an entirely different matter. The union singled out the most delinquent dissidents (again no one but Brodnik dissidents were delinquent) for discharge in steps; first a pilot step of two discharges in April 1961; and then seven discharges, the dischargees herein, and then seven or eight more (which never were discharged because they all paid up). But all of those delinquents—every one of them—were the Brodnik dissidents, so that the entire build-up by the Board majority of discrimination by the union fails; and the Board majority by refusing to see or failing to see that all of the dischargees, including the two that were dis-

charged in April as a pilot step, then the seven that were discharged and including the next seven or eight ready for discharge, were all of the dissident group, failed to base their decision on a fair estimate of the worth of the testimony because the testimony showed there was no discrimination. Those chosen for discharge by Mr. Zicarelli were chosen in order of their delinquency! The pilot step—the discharge of Homovec and Koszowski as the most delinquent—then came the discharge of the first 7 dischargees who were next most delinquent. (See R. 298-309 showing the progressive delinqueney.) Then came 7 or 8 more who were to be discharged, if necessary (but they came in and paid their dues so it wasn't necessary to discharge them), which covered all the delinquents in the plant, who were but 20 in 1961 (R. 190) and *all were Brodnik dissidents* (id). Nothing was offered or shown by the General Counsel to oppose this evidence. He did not even allege differently or claim it in his brief. (See R. 29 where the Trial Examiner set forth General Counsel's statement of issues in his brief.) The Board should have followed its own decision in *General Motors Corporation, Packard Electric Division*, 134 NLRB 1107 (1961), where it held there could be little union security where dissident members can frustrate the orderly administration of collective bargaining agreements. There the Board upheld the discharge of the dissidents for nonpayment of dues. On this decision this petitioner at the hearing tried to bring this issue in the case and was overruled by the Trial Examiner who said, "Well, the last paragraph, the last portion of Paragraph 13 (GC Exh. 1-T; R. 256) as far as I could see, now sums up all his [the General Counsel] complaints. *He doesn't claim that they were fired for some other reason than non-payment of dues.* His case is simply that they were fired because they were required to pay a fine as-

sessed against them for non-attendance at union meetings. Now I have raised that question before and Mr. Griesbach [the General Counsel's representative trying the case] has assured me that this is the nub of the case" (R. 102-3). The next day the General Counsel nevertheless amended the complaint for the 5th time adding a clause (13B) that alleged the discharge was also because the petitioner only accorded these dischargees 21 days grace period. This amendment was allowed over objection (R. 129-132). But this again never raised the issue that the employees were discharged for reasons other than non-payment of dues which is the issue now decided, and wrongly, by the Board. This holding when upheld by the Court of Appeals became in direct conflict with the decision in *NLRB v. Fulton Bag & Cotton Mills*, 175 F. 2d 675 (5th Cir. 1949), which held,

> "Finally as to the gratuitous, the volunteered findings of the examiner and Board without charges or complaint to support them, that respondent discriminated in respect to Smith, Rose, Longmire, Kelley, and Guthrie, and the consequent condemnation of respondent for having done so, we find no warrant in the statute, none in the elementary conceptions of procedural justice for them. It is true that no consequences were visited upon respondent as a result of these findings, no doubt because it was clearly seen that to punish as well as to condemn without a charge and hearing on the charge would be shocking to fundamental conceptions of justice. It yet remains that the findings were made with the purpose and intent that they should have some weight against and effect upon respondent, and respondent is entitled to have them here reviewed and disapproved."

And further:

> "In respect to the Board's finding that respondent discriminated against Smith, Rose, Longmire, Kelley and Guthrie, its position is that this finding is contrary

to law and particularly to Sec. 5(a) of the Administrative Procedure Act in that there was neither charge nor complaint of such discrimination and respondent has been in effect condemned without a hearing by finding him guilty of charges of which he had no notice and against which he has had no opportunity to defend."

Besides intruding this issue in the case the Board then decided it contrary to the credible evidence that was in the record. The Board majority even quoted *Puerto Rico Drydock & Marine Terminals, Inc. v. NLRB* [11] as the proper way for a union to request discharges as follows:

"* * * It is probably true that in such a situation (a number of dues delinquent employees), instead of requesting the discharge of all recalcitrants, * * * the union might properly proceed first by a sort of 'pilot' step. That is, it might first request the discharge of a few employees in order to demonstrate the seriousness of its requirements."

In the instant case, the petitioner under advice of counsel did exactly what the Board approved and set forth in the *Puerto Rico* case as the proper manner of handling these situations. It warned some of these employees in 1960 and it warned some of them in February 1961 and some paid up. Then see the uncontradicted credible testimony of Zicarelli (R. 204):

"Q. But did you thereafter and from July when you went through the courtesy of writing a letter to each one of these persons so that they would be sure that they knew that they were delinquent, did you thereafter talk with them and ask them to pay the dues?

A. We talked to some of them. I had the Stewards talk to them. I had members talk to them.

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[11] 284 F. 2d 212 (DC Cir.) cert. den. 64 U. S. 883.

Q. *And did actually some of the twenty or thirty persons start paying their dues?*

A. *They did.*" (Emphasis added.)

Thereafter, the petitioner requested the Company to discharge the two most delinquent, Homovec and Koszowski, as a pilot step in order to demonstrate the seriousness of its move. Zicarelli then waited for two weeks expecting all the rest of the dissident group to come in and pay dues. They didn't do so. Therefore, on May 2, Zicarelli sent the second of the pilot step letters, for the next most delinquent, withholding 7 or 8 of these delinquents, hoping again that he wouldn't have to discharge all of them. Nothing could be more clear than his uncontradicted testimony on this point (R. 207).

"Q. Why did you have these two, Homovec and Koszowski, discharged prior to the requesting that the other seven be discharged?

A. The reason I don't that (sic) sir, I thought by doing that I could wake up the rest. They knew they were behind. They met together; they talked together. I thought by those two leaving, they knew that they were going on a Bowling Tournament, that they would talk it over and may be before not too long they would all come in and pay their dues. Then my troubles would be over. But that didn't happen.

Q. But that was the purpose—

A. of—

Q. —of having those two discharged?

A. That is right. But that didn't happen.

Q. You waited then until May 2nd to submit any more letters, is that right?

A. That is right, sir.

Q. Now, on May 2d, did you have more than the seven people that you were planning to discharge if they didn't pay their dues?

A. I would have had more if they didn't come in and start to pay.

Q. Well, you are answering too early.

A. I'm sorry.

Q. Did you have—about how many other letters did you have prepared?

A. I would say that it was in the neighborhood of approximately *seven or eight more to go.*

Q. And you *sent out* only seven letters on May 2d, is that right?

A. That is right.

Q. And were you going to send out the other letters the next day?

A. I would have *sent them out possibly* two or three weeks later.

Q. You were going to *hold them* for two or three weeks?

A. That is right.

Q. Did all of those come in and pay their dues on May 3rd?

A. *They did—they did.*"

How could this credible and uncontradicted testimony be overlooked by the Board majority? This is exactly the way to enforce a union shop clause as the Board has pointed out in *Puerto Rico* above.

The dissenting members stated (R. 23),

> "* * * we also do not believe that in undertaking a less lenient enforcement of the contract, a union must necessarily cause the discharge of all delinquents where the Union may achieve the same lawful objective by making an example of a few, providing, of course, and such was the case here, that the Union puts all affected employees on notice. The Union, by invoking the security provisions of its contract, did not do more than it was lawfully entitled to do, and it accorded the dissidents no less than they were entitled to receive."

The Board majority admitted that this is the crux of the entire case (though not tried nor argued) and somehow

the Board majority overlooked or missed testimony so vital, completely uncontradicted and from a witness found credible by the Trial Examiner. This issue was not in the case and was decided against all evidence which produces a condition impossible for a counsel to meet. All tests of fairness are missing.

8. Summation.

All of these findings including the last which was superimposed on the Trial Examiner's Report were against the findings of the Trial Examiner; were against his credibility findings and contrary to his findings of fact. In *Universal Camera Corporation v. NLRB, supra*, the Supreme Court ruled decisively on the effect of the 1947 amendments on reviewing courts in a manner that is very relevant here. The Supreme Court in an exhaustive opinion held as follows:

> "* * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."
>
> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. *We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.* The findings of the examiner are to be considered along with the consistency and inherent

probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.'"

"The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.' Thayer, A Preliminary Treatise on Evidence, 530, *Funk v. United States*, 290 U. S. 371. This Court has refused to accept assumptions of fact which are demonstrably false, *United States v. Provident Trust Co.*, 291 U. S. 272, even when agreed to by the parties, *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 281. Machinery for discovery of evidence has been strengthened; the boundaries of judicial notice have been slowly but perceptibly enlarged. It would reverse this process for courts to deny examiners' findings the probative force they would have in the conduct of affairs outside a courtroom. * * * We therefore remand the cause to the Court of Appeals. *On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial.* But the court need not limit its reexamination of the case to the effect of that report on its decision. We leave it free to grant or deny enforcement as it thinks the principles expressed in this opinion dictate. (Emphasis ours.)

Judgment vacated and cause remanded."

The Court of Appeals (Second Circuit) then on remand in *NLRB v. Universal Camera Corporation*, 190 F.

2d 429 (1951), reversed the Board. Its findings are very relevant here also. It said:

> "Just where the Board's specialized experience ends it may no doubt be hard to say; but we are to find the boundary and beyond it to deem ourselves as competent as the Board to pass upon issues of fact. We hold that all the issues at bar are beyond the boundary and for that reason we cannot accept the Board's argument that we are not in as good a position as itself to decide what witnesses were more likely to be telling the truth in this labor dispute." * * *
>
> "Perhaps as good a way as any to state the change effected by the amendment is to say that we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."

We believe that under these criteria the Board's majority decision should be overturned on all the major findings above but most surely on this last one where testimony was credible, uncontradicted and on what the Board decision says is the crux of that decision—i.e. that delinquency was not the reason for the discharges but that the petitioner applied its union-security clause discriminatorily. No discrimination was shown here and in fact patience and kindness was shown for a long, long time and then the security clause was applied by the Board suggested procedure—a pilot step—then the petitioner requested only 7 to be discharged out of the 14 or 15 more delinquent as the general manager said "* * * so they would all come in and pay their dues. Then my troubles would be over."

B. THE BOARD WAS NOT JUSTIFIED IN FINDING THAT CONDUCT WHICH OCCURRED WITHIN THE 6 MONTH LIMITATION WAS AN UNFAIR LABOR PRACTICE, SOLELY THROUGH RELIANCE ON AN EARLIER UNFAIR LABOR PRACTICE WHICH IS BARRED BY TIME FROM BEING ASSERTED AS A BASIS FOR A COMPLAINT.

The Board rejected this argument that Section 10(b) barred all evidence of matters which occurred 6 months before the filing of the charge. The Trial Examiner never said anything about this in his report. An exception to his report for *not* ruling on it was filed by this petitioner. The Court of Appeals did not mention it.

This is not a case of "earlier events" being utilized to throw light on unfair labor practices. Unfair practices in 1958 were alleged that the petitioner assessed an illegal fine against its members and the Board majority found this unfair labor practice to have occurred (R. 7). This fine became an issue in 1958 as the Board found and was repealed in November 1959. Charges were filed in July 1961.

The last day of the hearing the General Counsel amended the Complaint for the last time so that the "charging" paragraph 13 reads as follows:

> 13. (A) On or about May 2, 1961, Respondent Union, through its Business Manager, Peter J. Zicarelli, attempted to cause and did cause Respondent Employer to discharge employees Edward Clar, Anton Draganic, Joseph J. Dudash, Mary Jaksic, Betty Sipos, Anna M. Tomko, and Louise Yominck, by demanding that Respondent Employer discharge said employees for the asserted reason that such employees stood suspended by Respondent Union as of May 1, 1961, and that the collective bargaining agreement in effect between the parties required that all employees of Respondent Employer remain members in good standing of Respondent Union, when in fact the aforenamed

individuals had tendered the requisite amounts of dues and initiation fees uniformly required as a condition of retaining membership in Respondent Union at all times prior to May 2, 1961, and were not delinquent in their dues to the extent that their good standing in the Union was impaired under Respondent Union's applicable rules and regulations, *and the real reason for Respondent Union's demand for the Respondent Employer to discharge said individuals was its insistence that said individuals, and other employees, pay a fine assessed against them for non-attendance at union meetings.*

(B) On or about May 2, 1961, Respondent Union also attempted to cause and did cause Respondent Employer to discharge the seven employees named above in Paragraph 13 because it accorded said employees a grace period of only 21 days for the payment of dues rather than a grace period of three or six months that it made generally applicable to its members.

Paragraph (A) above alleges that the Respondent Union insisted that the dischargees pay a fine assessed against them. From the foregoing pages of this brief it will be remembered that the issue over fine or $1.00 given away at meetings occurred in 1958—3 years before the charges was filed herein. For the Board to hold that a union causes the discharge of an employee because he refused to pay a "fine" 3 years ago, is a misconception of the purpose and meaning of the 6 month limitation.

This is the same misconception of the "continuing violation" as the Supreme Court criticized and held unjustified in *Local Lodge 1424 Machinists v. NLRB*, 362 U. S. 411 (1960), where a Board majority held an illegal union security clause rendered a contract illegal forever and that the General Counsel could issue complaint any-

time thereafter without regard to the 6 months limitation in Section 10(b). The Court said:

> "It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice * * *.
>
> The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.
>
> * * * * * *
>
> Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on

> the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships."

Presumably if the union had caused the Company to discharge employees for non-payment of dues in the *Lodge 1424* case the ruling of the Supreme Court would be the same. In that situation the facts would be the same as in the instant case.

We believe the 1958 "fine" was barred by the 6 month limitation in the Act and if the fine was barred, the so-called tenders were properly rejected in 1958 and each dischargee was 3 or 4 months delinquent in dues and were properly discharged by the Company on request of the Union even by the Board's finding that 3 months delinquency is required for discharge.

In paragraph 13(B) of the Complaint the allegation is that the Union discriminatively applied the 21 day security clause in its contract. This would not be relevant if the limitation barred the issue of the fine as each dischargee now would be over 3 months delinquent and so discharged correctly under the Board's findings. Therefore the Complaint would need to be dismissed.

WHEREFORE, petitioner prays that this petition be granted.

THURLOW SMOOT,
21st Floor, 55 Public Square,
Cleveland 13, Ohio,
Counsel for Petitioner.

APPENDIX A.

Labor-Management Reporting and Disclosure Act of 1959.

Title I, Sections 1 and 2:

Section 101. (a)(1) EQUAL RIGHTS—"Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates to vote in elections of referendums of the labor organization to attend membership meetings to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organizations' Constitution and Bylaws.

(2) Title—FREEDOM OF SPEECH AND ASSEMBLY—"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates and upon the election of the labor organization or upon any business properly before the meeting, subject to the conduct of meetings. (Provided that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduction that would interfere with its performance of its legal or contractual obligations)."

APPENDIX B.

Labor-Management Relations Act of 1947, as Amended.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * * That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

APPENDIX C.

Administrative Procedure Act.

Sec. 1009. Judicial review of agency action.

(e) Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Scope of Review.

* * * (3) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1964, c. 324, Sec. 10, 60 Stat. 243.

APPENDIX D.

Exceptions of the General Counsel to the Intermediate Report and Recommendations of the Trial Examiner.

Now comes W. R. Griesbach, Counsel for the General Counsel, and excepts to the following findings, conclusions and recommendations of the Trial Examiner in the Intermediate Report issued March 12, 1962, in the above-captioned cases, and to the failure of the Trial Examiner to make findings, conclusions and recommendations as hereinafter set forth.

1. Page 4, Lines 51-53, and Page 7, Lines 29-31.

The conclusion of the Trial Examiner that the $1 dues refund granted its members by the Union for attending its meetings constituted a reward for such attendance rather than being in effect a fine imposed upon members who did not attend.

2. Page 6, Lines 42-45.

The conclusion and finding that the Union's $1 dues refund to members attending its meetings was not in effect a fine levied against those members who did not attend, and the failure to find that the Union's $1 refund of its nominal monthly dues of $4 to those members attending its meetings during the period of May through August, 1958, did constitute in effect a fine for non-attendance at such meetings.

3. Page 4, Line 37, Page 5, Line 4.

The failure to specifically find that the Union rejected the tender of a total of two months' dues made in behalf of each of the seven alleged discriminatees during the period of May through August, 1958, for the reason that such

tenders were submitted in the amount of $3, without including the $1 fine for nonattendance at union meetings, or in conjunction with $3 dues tenders of other members.

The failure to find that the tender of a total of two months' dues made in behalf of each of the seven alleged discriminatees, whether in the amount of $3 or $4, rejected by the Union during the period of May through August, 1958, constituted valid tender.

5. Page 7, Lines 56-58.

The conclusion that the Union's September, 1958, letter to the alleged discriminatees was a valid request for the retender of their previously rejected dues, and the failure to find that such letter, inasmuch as it did not separate the Union's demand for dues from the demand for fines, did not constitute a valid request for the retender of the rejected dues alone.

6. Page 8, Lines 1-3.

The conclusion that the seven dischargees, as of the date of their discharges, had not fulfilled their obligation to tender periodic dues uniformly required by the Union as a condition of membership, but were in fact delinquent in their dues and not members in good standing.

The failure to find that the seven dischargees had tendered to the union the periodic dues, exclusive of fines, uniformly required by the Union as a condition of membership, and that therefore the union security clause in the applicable contract between the Union and the Employer did not sanction their discharge.

The failure to find that at all times material herein the Union was extending to its members a grace period of at least three months for the payment of dues, and that all of the seven alleged discriminatees were less than three

months in arrears when the Union demanded and obtained their discharges.

9. Page 8, Lines 5-15.

The conclusion that the Respondent Employer had no reasonable grounds for believing that the discharges were requested by the Union for reasons other than discriminatory denial of membership or failure to pay dues.

The failure to find that all seven alleged discriminatees, whose discharge the Union had requested simultaneously, uniformly informed a responsible agent of the Respondent Employer at the time of their discharge that they were not delinquent in their union dues, and that five of the seven expressly informed such agent that the Union had rejected their dues tender for two months, thus warranting the inference that the Employer had reasonable grounds for believing that the Union demands for the discharge of the seven employees were based upon the Union's termination of their membership for reasons other than their failure to tender the periodic dues uniformly required as a condition of retaining membership.

11. Page 8, Lines 17-20.

The conclusion and finding that the evidence fails to sustain the allegations of the complaint that the Respondent Union and the Respondent Company violated, respectively, Section 8(b)(1)(A) and (2), and Section 8(a)(1) and (3) of the Act, and the failure to find to the contrary.

12. The failure to recommend that the Respondent Union should be required to make whole the seven alleged discriminatees, jointly and severally with the Respondent Employer, for any loss of pay incurred by reason of the discrimination against them.

13. The failure to recommend that the Respondent Employer should be required to offer reinstatement to the seven alleged discriminatees to their former or substantially equivalent positions without loss of seniority or other rights and privileges, and to make whole such discriminatees, jointly and severally with the Respondent Union, for any loss of pay incurred by reason of the discrimination against them.

Dated at Cleveland, Ohio, this 16th day of March, 1962.

Respectfully submitted,

/s/ W. R. GRIESBACH,
W. R. Griesbach,
National Labor Relations Board,
Eighth Region,
Counsel for the General Counsel.

APPENDIX E.

Opinion of the Court of Appeals.

No. 15,355.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE LEECE-NEVILLE COMPANY AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1377, AFL-CIO,

Respondents.

PETITION for Enforcement of Two Orders of the National Labor Relations Board.

Decided April 9, 1964.

Before PHILLIPS, Circuit Judge, KAESS and WEINMAN, District Judges.

WEINMAN, District Judge. This case is before the Court on the petition of the National Labor Relations Board for enforcement of its order issued on December 11, 1962 against respondents, The Leece-Neville Company (hereinafter referred to as the Company) and International Brotherhood of Electrical Workers, Local Union 1377, AFL-CIO (hereinafter referred to as the Union).

The Board's order of December 11, 1962 was based upon its findings that the Union violated Section 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act (hereinafter referred to as the Act) by causing the dis-

charge of seven employees for reasons other than failure to tender periodic dues uniformly required as a condition of Union membership and that the Company violated Section 8(a) (3) and (1) of the Act by discharging the employees upon the Union's demand when it had reasonable grounds to believe that the employees' membership in the Union had been suspended for reasons other than nonpayment of the required dues.

The record reveals no material dispute as to the following facts: In 1957, a group of dissident employees, while still members of the Union, formed a rival organization called the Electrical Workers Alliance, Inc. to supplant the Union at the Company's plant. Under instructions from their counsel to harass the Union, several hundred members of the rival group withdrew their checkoff authorizations. Thereafter, the seven complainants,[1] and many others, began paying their dues to the Union through a collector named Josephine Sturtz, a leader of the rival organization. Upon here transfer to another department in the early summer of 1958, Rose Brodnik, another leader of the rival organization, took over her role as dues collector for this group.

Regarding union membership, the collective bargaining agreement between the Union and the Company contained the usual union security clause which provided:

> "Section 1. (a) The Company agrees that for the period of time covered by this Agreement it is a condition of employment that all employees subject to this Agreement shall become and remain for the duration of this contract members in good standing of the Union. All new employees covered by this Agreement must, as a condition of continued employment, after

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[1] Edward Clark, Anton Dragarić, Joseph Dudash, Mary Jaksic, Betty Sipos, Anna Tomko and Louise Yomnick.

their first thirty (30) days of employment, become and remain members of the Union."

Regarding monthly dues, the Union's bylaws provided, as herein pertinent:

"Section 3. The monthly dues shall be $4.00

"Section 4. $1.00 refund of dues collected for attendance of monthly meetings."

However, since November 30, 1959, the amended bylaws no longer provide for a refund for meeting attendance.

For various months in the summer of 1958, the Union rejected the tenders of dues from the seven complainants. The Court does not deem it necessary to recite the details regarding the tenders by these employees and the various rejections by the Union. For the purpose of this opinion, it is sufficient to state that the Union's rejections were for one or more of the following reasons:

(1) A tender of $3.00 was not proper since the Union's dues were $4.00 and if the employee wanted the $1.00 refund, he would have to attend the monthly meeting and take it at the door, (2) a tender of $4.00 was not proper since it was commingled with tenders of other employees in the amount of $3.00 and (3) a tender was not proper since it was commingled with a tender of a suspended or expelled member of the Union.

Subsequent to the foregoing rejections, six complainants made current payments of dues in the amount of $4.00 for all months through March 1961. The other complainant, Dudash, made current payments of dues in the amount of $4.00 through February 1961. All of the foregoing payments were accepted by the Union but applied to the earliest months for which the Union's records showed no payment. Accordingly, on May 1, 1961, the

Union's books showed that all of the complainants, except Dudash, were in arrears in payment of their dues for February, March and April of 1961; Dudash was in arrears for an additional month, January 1961. The dues for May were not due and payable until May 5 so none of the seven had paid his or her May 1961 dues prior to the discharge on May 3.[2]

On May 2, 1961, the Union sent to the Company individual letters demanding the discharge of each of the seven complainants on the ground that each was no longer a member in good standing.

On the following day, May 3, the Company, after consulting its counsel, discharged the seven employees. The Company concedes that it made no investigation or other inquiry, except to consult its legal c unsel, to seek verification of the validity of the Union's de nands before it discharged the seven employees on May 3, 1961.

Four of the employees, Jaksic, Sipos, Tomko and Yomnick, were discharged together in the office of the Company Superintendent, Mr. Speck. At that time, Speck was advised that each had paid her dues through Brodnik and that the Union had rejected their tenders of dues. Brodnik was then called to the office and she stated: "those people are all paid up."

Clark's wife telephoned the Company's Personnel Director, Mr. Siegworth, and told him that her husband had sent in two months' dues which were refused b.' the Union and in her opinion her husband was not delinquent.

Dudash and Draganic, when informed of their dis-

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[2] The Union argues that the May dues were due on May 1 because of a bylaw which provided: "Dues are payable monthly in advance." However, the Board correctly found that the dues were due and payable on Friday, May 5, pursuant to a notice posted by the Union in 1958 which stated that dues were due "the first Friday of each month."

charge by Company officials, also stated that they regularly had paid their dues.

On May 4, all seven discharged employees went to the Union's office and paid the amounts which the Union claimed they owed, plus a reinstatement fee of $1.00 and the dues for May.

After they made the aforesaid payments, the Union's Business Agent, Mr. Zicarelli, called Siegworth and asked him to rehire the seven discharged employees. Siegworth advised him that they could be rehired only as new employees and that they could be rehired only after employees who had been laid off for economic reasons had been recalled.

On August 18, 1961, Zicarelli wrote a letter to the Company stating: "* * * we do not have any objection to your rehiring the discharged employees but in fact wish you to rehire each of them." As in his previous request to the Company, Zicarelli made no mention of the employees' former status.

In December 1961, all seven complainants were rehired as new employees without credit for previous service.

Upon the foregoing facts, the Board, two members dissenting, found that the Union and the Company had engaged in certain unfair labor practices and ordered each to cease and desist therefrom and further ordered certain affirmative action designed to effectuate the policies of the Act.

As to the Union. The first question to be determined is whether a tender of $3.00 in the summer of 1958 was a valid tender of dues. The Board majority, relying upon the case of The Electric Auto-Lite Company,[3] held that

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[3] 92 N. L. R. B. 1072, enforcement granted, 196 F. 2d 500 (6 Cir. 1952), cert. denied, 344 U. S. 823 (1952).

under the Union's bylaws the amount of dues was only nominally set at $4.00 per month and the actual dues were $3.00 per month; the $1.00 refund being a "fine" or "penalty." The two dissenting Board members characterized the $1.00 refund as a "reward" for attending the meeting.

In the Electric Auto-Lite case, the Union adopted a resolution which provided for the increase in the regular monthly dues from $1.50 to $2.00 and further provided that members who attended the monthly meetings would be exonerated, upon appropriate evidence, from the payment of the additional 50 cents. In that case, the Board held, at page 1074, that the 50 cents, with the condition of attendance attached, was a "fine" rather than part of regular monthly dues and stated that "regardless of the means adopted to institute this charge, the necessary and intended effect was to fix a penalty upon those members who did not attend the monthly meetings." And, at page 1077, the Board stated:

> "The statute specifies that the 'periodic dues' be 'uniformly required.' This we read essentially to include the requirement that such dues be charged to all members alike or that any distinctions in amount be based upon reasonable general classifications. A charge which distinguishes between individual members who attend particular meetings and those who do not attend particular meetings, in our opinion, is not one 'uniformly' applied. Moreover, we do not doubt that a member's attendance at a union meeting is highly desirable and salutary to carry out the democratic process. But, as we have already held, [citing Union Starch & Refining Company, 87 N. L. R. B. 779] the Act as written may not be used as a means of requiring such attendance. The Act's machinery is equally unavailable to enforce the collection of a *fine* to accomplish this union objective."

Accordingly, the Board held that since the charge for nonattendance of union meetings was a "fine" rather than a payment encompassed within the term "periodic dues," the Union violated Section 8(a) (3) and 8(b) (2) of the Act when it caused the discharge of an employee for nonpayment of dues.[4]

In the instant case, this Court is in agreement with the following language and findings of the Board majority:

> "We see no essential difference between the two cases. As in the Electric Auto-Lite case, the Union's bylaws here, by incorporating into the nominal monthly dues of $4.00 a charge of $1.00 for nonattendance at Union meetings, created a dues structure based upon attendance or nonattendance at Union meetings. Members who did not attend Union meetings had to pay $4.00 per month. For members who attended such meetings the dues were fixed at $3.00 a month. In the Electro-Lite and other cases, [citing cases] the Board held that the statutory provision that the periodic dues and initiation fees be 'uniformly required' includes the requirement that dues be charged to all members alike, and that any distinction be based upon a reasonable classification. A classification of employees based upon attendance or nonattendance at Union meetings was held to be not a reasonable classification. The Trial Examiner attempts to distinguish the Electric Auto-Lite case on the ground that here the Union intended the one dollar payment to operate as a 'reward for attendance' rather than a charge for nonattendance. However, the

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[4] Of course, a union may fine its members for refusing to attend meetings but ". . . the internal rules of a labor organization, designed to control its members, such as imposition of fines for failure to attend meetings, special assessments, and other penalties, not being 'periodic dues,' may not be enforced by the union by a threat of loss of employment. . . ." [Citing numerous cases, including *N. L. R. B. v. Electric Auto-Lite Company, supra*]. *N. L. R. B. v. Spector Freight System, Inc.*, 273 F. 2d 272, 276 (8 Cir. 1960).

bylaws by defining the payment as the 'One Dollar refund of dues' clearly tied it up with the dues structure. This the Union had no right to do. We find that the complainants herein were not lawfully required in the summer of 1958 to pay as a condition of employment a charge of one dollar for nonattendance at Union meetings, and that the tender of dues in the amount of $3.00 was at the time a valid tender of dues. We also find that the tender of dues in the summer of 1958 in the amount of $4.00 per month, but rejected by the Union on the ground that it was commingled with the tender of dues in the amount of $3.00, was likewise a proper tender, inasmuch as there was in fact no commingling of sufficient and insufficient tenders." [5]

This Court's approval of the foregoing language of the Board majority disposes of two of the three reasons advanced by the Union for its rejections of tenders of dues, i.e., that a tender of $3.00 was not proper since the Union's dues were $4.00 and that a tender of $4.00 was not proper since it was commingled with tenders of other employees in the amount of $3.00. However, neither the Board majority nor the dissent made any statement in their respective opinions regarding the third reason for rejection of tenders of dues, i.e., a tender of dues was commingled with a tender of a suspended or expelled member of the Union.

The Court finds that the Board was justified in refusing to place emphasis upon the third reason advanced by the Union. The Court has examined the letters whereby the Union rejected the tenders of dues. The first letter, dated July 30, 1958,[6] makes no mention whatsoever of the

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[5] Joint Appendix, pages 7a and 8a. The Joint Appendix is the record in this case and was filed by the parties. It is, of course, to be distinguished from the Appendix to this opinion.

[6] General Counsel's Exhibit No. 9-A, Joint Appendix, page 271a. Reproduced at Appendix I to this opinion.

refusal to accept the tender because of commingling with suspended or expelled members. The second letter, dated August 25, 1958 does; [7] however, it is clear from the record that the Union's basic reason for the rejection was its insistence that the dues were $4.00 and the $1.00 refund must be obtained at the meeting. And it must be noted that had the members whose tenders were rejected by the aforementioned letters resubmitted dues in the sum of $3.00, those tenders would have been rejected.

The Court further finds that there is substantial evidence in the record to support the Board's finding "that at all times relevant to this proceeding the Union considered the grace period to be at least 3 months; and at the time of the discharges, none of the dischargees was in fact delinquent for that long a period." [8]

And finally, and the Court could have based its affirmance of the Board's order regarding the Union on this point alone, there is substantial evidence in the record to support the Board's finding that the Union, by its conduct from September 1958 through April 1961 waived any right it might have had to secure the discharge of these seven employees because of their alleged delinquencies. [9]

The Court concludes that there is substantial evidence in the record to support the Board's finding that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by causing the Company to discharge seven employees for reasons other than failure to tender periodic dues uniformly required as a condition of Union membership.

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[7] General Counsel's Exhibit 10-A, Joint Appendix, page 273a. Reproduced at Appendix II of this opinion.

[8] Joint Appendix, page 10a.

[9] See Appendix III to this opinion for the Board's findings as stated in Joint Appendix, pages 11a and 12a.

Accordingly, the Board's order regarding the Union is ordered enforced.

As to the Company. With respect to the Company, the Board found:

> "* * * Having failed in these circumstances to make an investigation, which would have disclosed that there was tender and rejection by the Union of the 2-month dues in behalf of the dischargees, the Company may not justify the discharge on the ground that it had no reasonable grounds for believing that membership of the complainants in the Union was terminated for reasons other than the failure of the complainants to tender periodic dues and initiation fees uniformly required as a condition of retaining membership in the Union." [Footnote omitted.] [10]

The Court finds burdensome the investigation which the Board would have required the Company to conduct. To determine whether or not the employees were actually delinquent in the payment of their dues would have entailed an extensive investigation. It would have required an examination of the Union's books, a judgment of the credibility of the persons involved and an interpretation of the Union's bylaws. A burden such as this should not be placed upon the Company.

Regarding the Company's duty in this matter, Section 8(a)(3) (B) provides:

> "* * * That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

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[10] Joint Appendix, page 14a.

In *National Labor Relations Board v. Pape Broadcasting Company*,[11] the Court enforced the order of the Board against the union, which had been found guilty of an unfair labor practice, for the reason that it caused the discharge of an employee because of his membership in another union. However, the Court refused to enforce the order against the company which had discharged the employee at the union's request. The Court, at page 200, noted that there was evidence in the record supporting the inference that the company committed unfair labor practices and evidence tending to negate that inference. Then, after stating its duty to examine the entire record, the Court said:

> "* * * we take cognizance of the obvious truth that in forming beliefs reasonable men do in fact consider all the information available, and that in consequence, 'reasonable grounds to believe' may not be inferred from *isolated* facts but on the contrary must consist of *all* the conflicting evidence available to the person sought to be charged with the belief, which furthermore must be sufficient for a reasonable man to form a belief upon evaluation thereof."

The Court then, at pages 201 and 202, reviewed certain testimony in the record and concluded:

> "It seems to us that * * * [the company] could hardly form a rational belief in the matter, with * * * [the union] telling him that * * * [the employee] had not tendered nor paid dues, and * * * [the employee] telling him the contrary. True, * * * [the employee] did show * * * [the company] money orders that * * * [the union] had returned to him; but * * * [the company] had no information as to whether these were in sufficient amounts or whether there was not some defect in the tender * * *."

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[11] 217 F. 2d 197 (5 Cir. 1954).

And finally, at page 203, the Court defined the word "believe" as used in the Act at Section 8 (a) (3) (A) and (B) to mean "to be convinced or to feel that something is true or at least probable." As previously stated, the Court refused to enforce the order against the company.

The instant case presents a situation similar to that in the *Pape* case. Here the Company also had only isolated and conflicting facts before it and it should not be obligated to conduct an extensive investigation to determine the merit of the Union's demand to discharge the seven employees.

The Court concludes that there is not in this record substantial evidence to support the Board's findings that the Company had reasonable grounds for believing that the employees' membership in the Union had been suspended for reasons other than failure to tender the required dues and that by acceding to the Union's demand to discharge the employees the Company violated Section (8) (a) (3) and (1). Accordingly, enforcement of the order of the Board regarding the Company is DENIED.

APPENDIX—I

APPENDIX TO OPINION OF THE COURT

COUNSEL'S EXHIBIT NO. 9-A.

"Certified Mail July 30, 1958

Dear Sister Brodnik:
1022 Dillewood Rd.,
Cleveland 19, Ohio

Dear Sister Brodnik:

We are returning the Bank Order in the amount of $70.00, together with the list of the members for whom the check represents monthly dues.

It is necessary that we return the check in the full amount because monthly dues is (sic) $4.00 and two names appear on the enclosed list for only $3.00. Will you please forward the correct amount.

Thank you.

Fraternally yours,

P. J. ZICARELLI
Business Manager

PJZ/mvc
Encl: (Check $70.00)
List"

APPENDIX—II

GENERAL COUNSEL'S EXHIBIT NO. 10-A

"CRRR

August 25, 1958

Mrs. Rose Brodnik,
1022 Dillewood Rd.,
Cleveland 19, Ohio

Dear Sister Brodnik:

We are returning various Cleveland Trust Company money orders which you sent us to cover dues for members at Leece-Neville for the months of July and August. As you will note from our letter of July 30, 1958, all dues are $4.00 per month. Each list which you sent us in your recent letter shows one person as paying $3.00 only, therefore, such money order and list cannot be accepted. Also, Mary Bank appears on one list for July and also one list for August. Mary Bank is not a member of this Union, therefore, dues cannot be accepted for her.

As soon as you have returned money orders for additional amounts to cover those members sending in only $3.00 we will return proper receipts.

We are returning Cleveland Trust Co. money order No. 268634 in the amount of $101.00—No. 268044 in the

amount of $23.00—No. 215417 in the amount of $15.00 and No. 215448 in the amount of $15.00, together with the lists of names which each money order covers.

Fraternally yours,

P. J. ZICARELLI
Business Manager

PJZ/mvc
Encl."

APPENDIX—III

BOARD'S FINDINGS AS STATED IN JOINT APPENDIX, Pages 11a and 12a

"We believe, moreover, that the Union has waived any right it may have had to secure the discharge of these employees because of their alleged delinquencies. Ever since September 1958 and until April 1961, the complainants made their successive payments of current dues through collector Brodnik on the assumption that their tender of dues for 2 months in 1958 was a valid tender. The Union accepted these successive payments of dues with the knowledge of such claim, but adhering to its position that the tender was invalid, back-dated such payments by 2 months. Such a state of affairs continued without any change until the Union's decision to invoke the union-security clause against the complainants. After Zicarelli's letter of September 10, 1958, complainants Draganic, Sipos, Clark, Tomko and Yomnick were never contacted by any Union agent concerning the subject of dues delinquency. Jaksic and Dudash testified that they were approached in July 1960 and February 1961, respectively, by the Union agents, but when they told the agents that the Union refused the tender of dues for 2 months, the subject matter was dropped. Having unlawfully refused to accept from the complainants the tender of 2 month dues in 1958, and thereafter for some 30 months having accepted their successive payments of current dues with

the knowledge of their claim that the tender was lawful, the Union in our opinion is barred from reversing its position and invoking the union-security clause without an adequate notice to the dischargees." [Footnote omitted.]

APPENDIX F.

Decree of the United States Court of Appeals for the Sixth Circuit.

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Board holding that the Union violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act be and the same is enforced. It is further ordered that enforcement of the Board's order holding that the Company violated Section 8 (a) (3) and (1) of the Act be and it is denied.

No costs awarded. Rule 23(4).

Approved for entry:

s/ CARL A. WEINMAN,
U. S. District Judge
(Sitting by Designation)